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No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

NORMAN J. BOLES AND MARGARET GONZALES, AND ALL OTHERS SIMILARLY SITUATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

WILLIAM KANTER
SUSAN A. EHRLICH
Attorneys
Department of Justice
Washington, D.C. 20530

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. B, *infra*, 3a-28a) is not reported.

JURISDICTION

The district court's order, holding unconstitutional 42 U.S.C. 402(g)(1), was entered on June 23, 1978

(App. B, *infra*, 27a-28a). Notice of appeal to this Court was filed on July 20, 1978 (App. C, *infra*, 29a-30a). On September 12, 1978, Mr. Justice Powell extended the time for docketing the appeal to and including November 17, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975); *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975).

QUESTIONS PRESENTED

1. Whether Section 202(g)(1) of the Social Security Act violates the Due Process Clause of the Fifth Amendment by restricting Mother's Insurance Benefits to women who were once married to the deceased wage-earners.

2. Whether the district court properly certified a nationwide class that includes persons not shown to have met the jurisdictional requirements of Section 205(g) of the Social Security Act.

3. Whether sovereign immunity bars the award of retroactive monetary relief to persons denied Social Security benefits under a statutory section later held unconstitutional.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Section 202(g)(1) of the Social Security Act, 42 U.S.C. 402(g)(1), provides in pertinent part:

> The widow and every surviving divorced mother (as defined in section 416(d) of this title) of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—
>
> (A) is not married,
>
> (B) is not entitled to a widow's insurance benefit,
>
> (C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,
>
> (D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,
>
> (E) At the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit, and
>
> (F) in the case of a surviving divorced mother—
>
> (i) the child referred to in subparagraph (E) is her son, daughter, or legally adopted child, and
>
> (ii) the benefits referred to in such subparagraph are payable on the basis of such individual's wages and self-employment income

shall * * * be entitled to a mother's insurance benefit * * *.

3. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides in pertinent part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party * * * may obtain a review of such decision by a civil action * * *. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business * * *.

4. Section 216(d)(3) of the Social Security Act, 42 U.S.C. 416(d)(3), provides:

> (3) The term "surviving divorced mother" means a woman divorced from an individual who has died, but only if (A) she is the mother of his son or daughter, (B) she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of 18, (C) he legally adopted her son or daughter while she was married to him and while such son or daughter was under the age of 18, or (D) she was married to him at the time both of them legally adopted a child under the age of 18.

STATEMENT

Section 202(g) of the Social Security Act provides mother's insurance benefits to the mother of a child of a wage earner who dies fully or currently insured under the Act. To be entitled to benefits, the woman

must have been married to the wage earner and must have in her care a child of the deceased wage earner who is entitled to a child's insurance benefit under Section 202(d).[1] The payments are intended to replace the support lost by the wage-earner's death and thus to enable the beneficiary to choose between working and staying at home to care for her entitled child. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); Advisory Council on Social Security, *Reports on the Old-Age, Survivors, and Disability Insurance and Medicare Programs* 30 (1971); *Final Report of the Advisory Council on Social Security* 31 (1938).

Norman W. Boles, an insured wage earner, died on October 10, 1971. His widow, Nancy L. Boles, and their two sons were awarded mother's and children's insurance benefits. On January 15, 1973, Margaret Gonzales, a woman with whom Norman W. Boles had lived from 1963 to 1966 but whom he had never married,[2] filed claims for mother's insurance benefits and, on behalf of her son, Norman J. Boles, for child's insurance benefits. The claim for child's insurance benefits was granted under Section 202(d), but the claim for mother's insurance benefits was denied. App. B, *infra*, 3a-5a. Because Gonzales was never married to Norman W. Boles, she did not meet the requirements for eligibility under Section 202(g)(1).

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[1] The woman also must meet other eligibility requirements not germane to this suit.

[2] Norman W. Boles married Nancy in 1967.

After exhausting her administrative remedies, Gonzales instituted this action in the United States District Court for the Western District of Texas.[3] The district court certified the action as a class action, on behalf of a class consisting of "all illegitimate children and their mothers who are presently ineligible for Mother's Insurance Benefits solely because 42 U.S.C. § 402(g)(1) restricts such benefits to women who were once married to the fathers of their children" (App. A, *infra*, 1a-2a). The district court then held "that Section 202(g)(1) of the Social Security Act, 42 U.S.C. § 402(g)(1), is unconstitutional and void insofar as it prevents Plaintiffs and the Plaintiff Class from receiving Mother's Insurance Benefits solely on the ground that Plaintiff mothers were never married to the fathers of their children" (App. B, *infra*, 24a).

The court first interpreted *Weinberger* v. *Wiesenfeld*, *supra*, as holding that mother's insurance benefits are designed to benefit the children of the wage earner; the court then concluded that denying illegitimate children the benefits of mother's insurance discriminates against them in violation of the equal protection principles discussed in *Trimble* v. *Gordon*, 430 U.S. 762 (1977), and *Jimenez* v. *Weinberger*, 417

[3] An identical case was originally filed in the United States District Court for the District of Columbia and transferred to the Western District of Texas. Because of procedural concerns (App. B, *infra*, 6a), this second action was filed. The first case was dismissed after the issuance of the order of the district court in this case.

U.S. 628 (1974). The court permanently enjoined the Secretary from denying benefits to the plaintiff class on the basis of the marriage requirement, ordered the Secretary to make payment of mother's insurance benefits to "the named plaintiffs" (Boles and Gonzales) retroactive to the date of Gonzales's claim, and directed the Secretary to notify "all illegitimate children receiving Child's Insurance Benefits and their mothers that they are no longer ineligible for Mother's Insurance Benefits solely by reason of the marriage requirement * * *" (App. B, *infra*, 24a-25a).

THE QUESTIONS ARE SUBSTANTIAL

The district court has held that an Act of Congress is unconstitutional. We believe that, in so doing, the court both selected an improper standard of judicial review and misapplied the standard it selected. The questions presented involve substantial sums of money and affect large numbers of persons;[4] review by this Court therefore is appropriate.

1. The Social Security program establishes hundreds of eligibility rules and classifications. Mother's benefits are part of the secondary insurance system

[4] The Department of Health, Education and Welfare has made a preliminary estimate that the invalidation of the marriage requirement of Section 202(g)(1) would cost at least $60 million annually. Because of the limit on the benefits, invalidation of the marriage requirement also would lead to the reduction of benefits paid to married mothers (see note 11, *infra*).

described in *Califano* v. *Jobst*, 434 U.S. 47, 52-53 (1977):

> The provision challenged in this case is part of a complex statutory scheme designed to administer a trust fund financed, in large part, by taxes levied on the wage earners who are the primary beneficiaries of the fund. The entitlement of any secondary beneficiary is predicated on his or her relationship to a contributing wage earner. If the statutory requirements for eligibility are met, the amount of the benefit is unrelated to the actual need of the beneficiary. The statute is designed to provide the wage earner and the dependent members of his family with protection against the hardship occasioned by his loss of earnings; it is not simply a welfare program generally benefiting needy persons.
>
> Nor has Congress made actual dependency on the wage earner either a sufficient or a necessary condition of eligibility in every case. Instead of requiring individualized proof on a case-by-case basis, Congress has elected to use simple criteria, such as age and marital status, to determine probable dependency. A child who is married * * * is denied benefits because Congress has assumed that such a child is not normally dependent on his parents. There is no question about the power of Congress to legislate on the basis of such factual assumptions. General rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases.
>
> Of course, a general rule may not define the benefited class by reference to a distinction which irrationally differentiates between identically situated persons. Differences in race, religion, or political affiliation could not rationally justify a difference in eligibility for social security benefits, for such differences are totally irrelevant to the question whether one person is economically dependent on another. But a distinction between married persons and unmarried persons is of a different character. [Citations and footnotes omitted.]

In this case, as in *Jobst*, the statute makes marriage a pertinent consideration in the determination of eligibility. Here, as there, marriage is relevant to the question of economic dependence on the wage earner. The provision involved in *Jobst* rested on Congress' conclusion that married children are less likely to be economically dependent on their parents than unmarried ones. The provision in this case rests on Congress' conclusion that the mother of a wage-earner's child is more likely to be economically dependent on the wage earner if she is, or has been, married to him. A classification on the basis of either assumption will doubtless inaccurately reflect actual economic dependence in some cases, but it is nevertheless a rational general rule for allocating benefits.[5]

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[5] This Court has upheld similar general rules in the Social Security Act relating to marital status. *Weinberger* v. *Salfi*, 422 U.S. 749 (1975); *Mathews* v. *De Castro*, 429 U.S. 181 (1976). In *Salfi* the Court concluded that there was no constitutional bar to the disqualification of the wage-earner's widow from the receipt of mother's benefits because she failed to meet the statutory requirement of marriage to the wage

The district court held, however, that some enhanced scrutiny of the marriage requirement here is required because the children of unmarried persons are illegitimate, and the statute, by denying benefits to mothers, reduces the funds available for mothers' care of children and thus discriminates against the illegitimate children (App. B, *infra*, 8a-13a). It then concluded that the classification could not withstand the enhanced scrutiny that should be applied to discrimination against illegitimate children. The court's analysis rests on its reading of *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975). The district court concluded that *Wiesenfeld* holds that mother's insurance benefits are "really" for the child (App. B, *infra*, 7a, 13a), so that the child may receive the care of his surviving parent. Under this view, the denial of mother's benefits should be treated exactly as if the child had been denied benefits on the basis of illegitimacy.

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earner at least nine months before his death. In *De Castro* the Court sustained the statutory denial of mother's benefits to divorced wives under age 62 of living wage earners, although both the wives of such wage earners and the divorced wives of deceased wage earners are eligible for such benefits regardless of their age. In both *Salfi* and *De Castro* the Court recognized that it is not a constitutional requirement that the statutory classification "precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute." 422 U.S. at 777; 429 U.S. at 189. See also *Zablocki* v. *Redhail*, 434 U.S. 374, 403 (1978) (Stevens, J., concurring), noting that "[c]lassification based on marital status has been an accepted characteristic of tax legislation, Selective Service rules, and Social Security regulations."

The district court has misunderstood both this Court's opinion and the statute. The benefits are not supplementary children's benefits, intended to contribute additional child support. They are mother's benefits, designed to replace the support she lost by the wage-earner's death, and thus to give her the option to stay home to care for their children (420 U.S. at 648, 651).[6] Children have a separate entitlement to benefits.[7] Nothing requires a mother to use the mother's benefits in any particular way, and a mother's decision to continue working rather than to receive benefits does not affect the child's entitlement.

Wiesenfeld held that there is no rational basis for providing to a widow, but not to a widower, the option to stay home to care for a child (*id.* at 651). But *Wiesenfeld* does not suggest that such an option must, as a matter of constitutional necessity, also be offered to a surviving parent who has never been married to the wage earner.[8] That is the question

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[6] The Court in *Wiesenfeld* rejected the argument that the mother's benefit is designed to recognize the particular economic difficulties facing a woman seeking to support her family (*id.* at 648). The district court's interpretation of the mother's benefit as supplementary income to the child in a household headed by a single woman is analogous to that rejected argument.

[7] Norman J. Boles, the illegitimate child of Gonzales and Norman W. Boles, is entitled to and is receiving child's insurance benefits.

[8] The denial of such an option to an unmarried parent does not have the defect, condemned in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-176 (1972), of imposing legal burdens on the child for the actions of his parents. See also *Jimenez* v. *Weinberger*, 417 U.S. 628, 632 (1974).

involved here. The district court simply avoided that question by defining the mother's benefit as intended for the child.[9]

It is true, as the district court observed, that Congress has gradually expanded the category of spouses to whom the option to stay at home is made available (App. B, *infra*, 10a-13a). But this does not indicate that Congress has abandoned the principle that the death of the wage earner is more likely to result in a loss of support to his widow or former wife than to someone to whom he was never married. Nor does the fact that Congress has taken steps to meet the needs of certain categories of mothers require it also to extend benefits to mothers in appellee Gonzales's class. See *Califano* v. *Jobst*, *supra*, 434 U.S. at 57-58. Indeed, because the statute limits the total amount of monthly benefits payable on any wage-earner's account (42 U.S.C. 403a, 415),[10] judicial extension of the class of qualified mothers may mean that the

[9] The district court is wrong in concluding (App. B, *infra*, 22a-23a) that no legitimate children are affected by the marriage requirement of Section 202(g)(1).

A woman who has never married the wage-earner may not receive mother's benefits, even though her children by the wage earner have been legitimated by operation of state law, or she is caring for the wage-earner's children born in wedlock. Conversely, the statute provides that the wage-earner's widow with an entitled child in her care is entitled to mother's benefits (42 U.S.C. 402(g)(1)). That entitled child may be an illegitimate child of the wage earner. The case thus does not entail discrimination against illegitimate children even given the district court's view of the purpose of mother's benefits.

[10] See also Pub. L. No. 95-216, Section 202, 91 Stat. 1524.

mother's benefit will be unable to serve its primary function—providing sufficient support to permit the surviving parent to forego outside employment.[11] It is essential to the success of the legislative scheme to permit Congress to balance the desirability of extending the class of eligible mothers against the need to provide adequate payments to achieve the statutory purpose, while conserving the limited resources of the trust fund. The district court's decision upsets the legislative balance.

Moreover, even if the denial of mother's benefits to persons who have never been married to the wage earner were a classification based on illegitimacy, it would not be unconstitutional. This Court has consistently rejected arguments that such classifications are suspect. See *Mathews* v. *Lucas*, 427 U.S. 495, 506 (1976); *Trimble* v. *Gordon*, 430 U.S. 762, 767 (1977). And it has cited *Lucas*, a case involving a classification based on illegitimacy, as establishing the

[11] The effect of such an extension is illustrated by the facts of this case. Based on Norman W. Boles' earnings record (Tr. 44), the maximum amount payable on his account since June 1978 has been $322.00 each month. Without the payment of benefits to appellee Gonzales, each of the secondary beneficiaries receives $80.50, making a total monthly payment to the three members of Nancy Boles's household of $241.50, and $80.50 to Norman J. Boles. If Gonzales were also to be paid out of this maximum, the total payments to each of the other beneficiaries would be reduced by 20%, so that Nancy Boles's household would receive $193.20, and the Gonzales household would get $128.80. Although the increase in income to the Gonzales household would hardly be enough to permit Gonzales to subsist without other sources of income, the decrease in the Boles household's income might well require Nancy Boles to find employment.

proper standard of review in a case involving an entirely neutral type of classification under the Social Security Act. *Mathews* v. *De Castro*, *supra*, 429 U.S. at 185. The statute here is supported by a strong rationale, and, given its relatively indirect effect on illegitimates, the statutory classification is consistent with due process under whatever level of scrutiny is appropriate.

2. The district court erred in certifying this suit as a nationwide class action and in entering an injunction. Here, as in *Califano* v. *Elliott*, cert. granted, No. 77-1511 (Oct. 2, 1978), class relief is inconsistent with 42 U.S.C. 405(g), the exclusive jurisdictional basis for claims arising under the Social Security Act (*Weinberger* v. *Salfi*, *supra*, 422 U.S. at 757), for three reasons. First, relief was granted to persons who were not before the court. Second, the class included persons who have not filed any claim with the Secretary and therefore have not met the jurisdictional requirement of 42 U.S.C. 405(g). Third, the class was nationwide. The arguments we have made in *Elliott* are pertinent here as well.

3. The district court also erred in awarding retroactive benefits to Gonzales. As we contend at pages 28-31 of our brief in *Califano* v. *Aznavorian*, Nos. 77-991 and 77-5999, argued Nov. 6, 1978, Congress has not waived the government's sovereign immunity

for damages suits based on the unconstitutionality of provisions of the Social Security Act.[12]

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

WILLIAM KANTER
SUSAN A. EHRLICH
Attorneys

NOVEMBER 1978

[12] We will send a copy of our brief in *Elliott* to counsel for appellees as soon as the brief is filed. We have furnished them with a copy of our brief in *Aznavorian*.

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed June 22, 1978, By William Putnicki, Clerk;
By Wanda Peterson, Deputy Clerk]

Civil Action No. A-77-CA-104

NORMAN J. BOLES, MARGARET GONZALES,
on behalf of themselves and all those
similarly situated, PLAINTIFFS,

v.

JOSEPH CALIFANO, Secretary,
United States Department of
Health, Education and Welfare, DEFENDANT.

ORDER

Upon consideration of the motion of Plaintiffs Norman J. Boles and Margaret Gonzales for certification of this action as a class action, it is, by the Court, this 22nd day of June, 1978.

ORDERED that the motion of Plaintiffs is hereby granted; and it is further

ORDERED that this action is certified, pursuant to Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure, as a class action on behalf of a class consisting of all illegitimate children and their mothers who are presently ineligible for Mother's

Insurance Benefits solely because 42 U.S.C. § 402 (g)(1) restricts such benefits to women who were once married to the fathers of their children.

/s/ Jack Roberts
JACK ROBERTS
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed June 23, 1978, By William Putnicki, Clerk;
By Wanda Peterson, Deputy Clerk]

CIVIL ACTION NO. A-77-CA-104

NORMAN J. BOLES, MARGARET GONZALES,
on behalf of themselves and all those
similarly situated

v.

JOSEPH CALIFANO

MEMORANDUM OPINION AND ORDER

This action has been brought by the plaintiffs, Margaret Gonzales and her son, Norman J. Boles, who seek Mother's Insurance Benefits pursuant to section 202(g) of the Social Security Act, 42 U.S.C. § 402(g). The plaintiff Gonzales is not the widow of the deceased wage earner, who died a fully insured individual for purposes of collecting old-age insurance benefits. The plaintiff son is the illegitimate child of the wage earner and he is presently receiving Child's Insurance Benefits under 42 U.S.C. § 402(d) on the account of his father. Plaintiffs challenge the constitutionality of Section 202(g)(1) of the Act, as amended, 42 U.S.C. § 402(g)(1), which precludes entitlement to benefits to the mother of a child of a fully insured wage earner who never married that

wage earner. Plaintiffs claim that the purpose behind the enactment of 42 U.S.C. § 402(g)(1) was the protection and care of minor children, and that by paying benefits to a mother with minor children in her care, the resulting benefit would in fact inure to the minor child. Therefore, if the mothers of illegitimate children are not permitted to obtain mother's insurance benefits, the result is not only a loss for them but a loss of benefits to illegitimate children solely because of their illegitimacy. Defendant, on the other hand, argues that the benefit is for the mother, and that the plaintiff child was not denied this benefit because of his illegitimate birth, but because his mother failed to qualify for such entitlement under valid statutory criteria. This Court believes Plaintiffs' characterization of the case is the more apt one and aligns itself with that line of cases which has overturned enactments which unfairly discriminate against children solely on the basis of their illegitimacy.

I. Statement of Facts

The determinative facts in this case are not in dispute; most of them appear in the administrative record filed as part of this case. The plaintiff, Margaret Gonzales, and the deceased wage earner, Norman W. Boles, though never married, lived together in Georgetown, Texas, continuously from February 1963 until sometime in 1966. As a result of this relationship, Norman J. Boles, the plaintiff, was born on October 29, 1964.

Norman W. Boles returned to Wilson County, Tennessee and married Nancy L. Boles in April 1967. The two lived together until the wage earner's death on October 10, 1971. During their marriage they had two sons, Johnny W. Boles, born on January 12, 1969, and Jessie R. Boles, born March 8, 1970. Nancy L. Boles applied for and was found entitled to, on her own behalf and on behalf of her two sons, mother's insurance benefits and children's insurance benefits under the account of Norman W. Boles. She and her sons began receiving those benefits in December 1971, effective from September 1971.

On January 15, 1973, Margaret Gonzales made application on her own behalf and on behalf of Norman J. Boles for mother's insurance benefits and child's insurance benefits under the account of Norman W. Boles. Both applications were denied initially on April 13, 1973. On January 24, 1974, Margaret Gonzales' application was denied following a reconsideration determination. However, subsequent to a reconsideration determination, the application for child's insurance benefits on behalf of Norman J. Boles, who had been acknowledged in writing by the wage earner, had been approved. In April 1974, the monthly benefits payable to Nancy L., Johnny W., and Jessie R. Boles were reduced, effective from January 1973, to compensate for the addition of Norman J. Boles to the account of Norman W. Boles. This reduction was required to keep the account within the family maximum as allowed under section 215 of the Social Security Act, 42 U.S.C. § 415. On November 15, 1974, an administrative law judge of the Bureau

of Hearings and Appeals affirmed the decision denying mother's insurance benefits to Ms. Gonzales on the basis that she and the deceased wage earner had never been married. Review of that decision by the Appeals Council of the Bureau of Hearings and Appeals was requested by Ms. Gonzales on November 19, 1974.

On November 27, 1974, Plaintiffs filed an action in the United States District Court for the District of Columbia in which they sought convocation of a three-judge district court pursuant to the then-current version of 28 U.S.C. § 2282. That Court, on September 15, 1975, ordered a change of venue to the United States District Court for the Western District of Texas. In Texas, Judge John R. Brown, on November 10, 1975, issued an order designating a three-judge court. The three-judge court action has been pending on the docket of this court as Civil Action No. A-75-CA-171. On April 13, 1977, the Appeals Council of the Bureau of Hearings and Appeals denied Plaintiffs' claim. On June 10, 1977, Plaintiffs filed the instant action, apparently fearing that there might be a jurisdictional defect in the three-judge court action. Cross-motions for summary judgment have been filed in the case.

II. Preface to Legal Argument

The program of Social Security benefits for children of deceased wage earners includes Children's Insurance Benefits and Mother's Insurance Benefits. As the Court examines in more detail later, Mother's

Insurance Benefits were intended as a benefit to the child. The Supreme Court expressly so held in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), stating for example, that "§ 402(g) was intended only to provide an opportunity for children to receive the personal attention of one parent, since mother's benefits are linked to children's benefits only so long as it is realistic to think that the children might need the parent at home." 420 U.S. at 650, n.17. The legislative history also establishes that the purpose is to benefit the child. *See infra.*

In a line of twelve cases since 1968, the Supreme Court has repeatedly declared unconstitutional discrimination against illegitimate children and their mothers, particularly in cases involving social welfare benefits. The most recent case is *Trimble* v. *Gordon*, 430 U.S. 762 (1977), prohibiting discrimination against illegitimate children under interstate inheritance laws. The *Trimble* decision lists the eleven earlier cases. *See* 430 U.S. at 766, n.11.

Ten of the cases overturned discrimination against illegitimates. Only two of the twelve cases upheld any form of disparate treatment of illegitimate children. Those two cases were *Labine* v. *Vincent*, 401 U.S. 532 (1971) and *Mathews* v. *Lucas*, 427 U.S. 495 (1976). *Labine* has been in essence overruled, or at least limited to its facts, by *Trimble* v. *Gordon*. *See* 430 U.S. at 767-68, n.12 and 776, n.17. *Mathews* has for all practical purposes been rendered moot by *Trimble*. *See infra.*

Four of the twelve cases expressly held unconstitutional discrimination against illegitimates in Social

Security benefits. *See infra.* They require, in the Court's view, a similar holding here, where all illegitimate children are denied the benefits of Mother's Insurance Benefits while all legitimate children receive them, without regard in either case to whether the deceased father had even lived with or supported the children.

III. Mother's Insurance Benefits Are Intended as Benefits to the Child

The statute challenged herein, 42 U.S.C. § 402(g)(1), provides Mother's Insurance Benefits to allow the surviving child of a deceased worker to receive the care of its surviving parent, relieving at least to some extent the necessity of the surviving parent to leave the child and go to work. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975). The three principal eligibility requirements for Mother's Insurance Benefits, so far as this case is concerned, are:

1) that the child be eligible for or receiving Children's Insurance Benefits;

2) that the child be in the care of its mother; and

3) that the mother of the child had been married to the deceased father, either at the time of his death or by an earlier marriage followed by a divorce.

The first two requirements have been met herein. Plaintiff Norman Boles is receiving Children's Insurance Benefits and is in the care of his mother, Plaintiff Gonzales. The third requirement, marriage of the mother to the father, deprives plaintiff Boles and all

other illegitimate children of the benefits of Mother's Insurance Benefits.

In *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), the Supreme Court unanimously held that Mother's Insurance Benefits are for the benefit of the child. The Court stated at 420 U.S. at 648-49:

> ". . . § 402(g), linked as it is directly to responsibility for minor children, was intended to permit women to elect not to work and to devote themselves to the care of children. . . .
>
> "That the purpose behind § 402(g) is to provide children deprived of one parent with the opportunity for the personal attention of the other could not be more clear in the legislative history."

The Court went on to explain that "The whole structure of survivors' benefits conforms to this articulated purpose [care of children]." 420 U.S. at 650. It noted that widows without children obtain no benefits on the basis of their husband's earnings until they reach age 60, in most instances. Mother's Benefits cease when the child is no longer eligible for Child's Benefits or when the mother no longer has the child in her care or custody. Mother's Benefits also cease when the child reaches 18, even though Children's Benefits may continue until age 22. The Court noted that "This distinction also sustains our conclusion that § 402(g) was intended only to provide an opportunity for children to receive the personal attention of one parent, since mother's benefits are linked to children's benefits only so long as it is

realistic to think that the children might need the parent at home." 420 U.S. at 651, n.17.

Defendant attempts to distinguish *Wiesenfeld* on some vague ground that it involved a "family unit" which suddenly lost its wage earner, or that the marriage requirement is tied to an obligation of support. This contention ignores that statute in its present form and its legislative history. It is an argument based on a much different statutory provision for Mother's Benefits which Congress adopted in 1939 when it first provided for survivor's benefits, but which is inapposite today. Under the 1939 provisions, Mother's Benefits were provided only for widows who were actually living with the deceased worker at the time of his death. Act of August 10, 1939, 53 Stat. 1362, 1365 (76th Cong., 1st Sess.). But the "living with" requirement has been completely eliminated in the statute and there is no requirement that the deceased worker have ever been living with or supporting his wife or children. The legitimate children of the deceased wage earner, Mr. Boles, will receive the benefits of Mother's Insurance Benefits regardless of whether their father was living with them or supporting them at the time of his death, or even if he never lived with or supported them. In contrast, if Mr. Boles had left his wife and returned to live with plaintiffs Gonzales and Boles and died while living with and supporting them, they would still remain ineligible for Mother's Insurance Benefits. In other words, it is the illegitimacy of the child and not any notions of "family unit" which unconstitutionally de-

nies benefits to plaintiffs and the members of plaintiffs' class. *Levy* v. *Louisiana*, 391 U.S. 68 (1968); *Glona* v. *American Guarantee and Life Insurance Company*, 391 U.S. 73 (1968).

Another illustration that Mother's Benefits are unrelated to an existing family unit is the statutory changes which now provide such benefits to divorced mothers and their children. At its inception the Mother's Benefit was limited to widows and was even called "Widow's Current Benefits." This title was changed to Mother's Benefits in the 1950 amendment which gave Mother's Benefits to surviving divorced wives and their children. Act of Aug. 28, 1950, 64 Stat. 482, 485. This change alone dispels the defendant's argument that survivor's benefits are currently intended to protect against the vulnerability of the family unit, because we are now granting benefits to homes which had already been broken up as a family unit by divorce.

The current statutory scheme also contradicts defendant's emphasis on legally enforceable support obligations. For example, defendant argues that a divorced woman has a means by which she can compel support for herself and her children from her former husband. On the contrary, divorced mothers and their children are eligible for Mother's Benefits even if no legal obligation to support existed at the time of the wage earner's death, or at any time after the divorce. Prior to 1965, if the mother divorced the father and remarried, she lost eligibility for Mother's Benefits for all time due to her remarriage.

But since the 1965 amendment, if the mother's second marriage is terminated by divorce or death of her second husband, she may be eligible for Mother's Benefits on the account of her first husband (assuming all other requirements are met) because she "is not married" after termination of her second marriage. This is so even though any support obligation of her first husband most probably terminated at the time of her remarriage. All this demonstrates that Mother's Benefits are not related to an obligation to support the mother but rather stem from the statutory purpose to assist the children.

The provisions for Mother's Benefits to surviving divorced wives also illustrates in another way that the statute currently has no relationship to support requirements. In an earlier form, a surviving widow was entitled to benefits only if she were receiving at least half of her support from the former husband at the time of his death. Act of Aug. 10, 1950, 64 Stat. 482,485. That requirement no longer applies. P.L. 89-97, § 307(c)(3-5); 79 Stat. 286, 378 (1965). Now the divorced wife is eligible for Mother's Benefits even if she has never received any support from the father either for herself or for her children, even if the father was excused from any support obligations in the divorce proceedings. Thus such women and their children are eligible for Mother's Benefits even though no legal obligation to support the ex-wife exists at the time of the death of the father.

Where the statute discriminates against illegitimate children, an analysis must be made of the pur-

poses of the statutory scheme and the purposes for the disparate treatment. As the Supreme Court demonstrated in both *Jimenez* v. *Weinberger*, 417 U.S. 636 (1974) and *Trimble* v. *Gordon*, 430 U.S. 762 (1977), such an analysis looks to the reality of the statutory scheme and does not accept glib statements of its purpose by its defenders. Such an analysis herein demonstrates that the only reason plaintiffs have been denied Mother's Insurance Benefits is the illegitimacy of plaintiff Boles resulting from the failure of his mother and father to marry. It is the classic case of visting the sins of the parents on the child. As the Supreme Court pointed out in its most recent decision on point, "the parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status. *Trimble* v. *Gordon*, 430 U.S. at 770.

IV. Discrimination in the Social Security Act Against Illegitimate Children in Providing Mother's Insurance Benefits Violates the Fifth Amendment

The Supreme Court has made it clear that it is unconstitutional to deny illegitimate children benefits enjoyed by legitimate children solely because of the status of their birth. In *Weber* v. *Aetna Casualty and Surety Company*, 406 U.S. 164 (1972), the Court found it unconstitutional to deny the same right of recovery of workmen's compensation benefits to illegitimate children of deceased workers as was en-

joyed by legitimate children of deceased workers. Relying on its prior decision in *Levy* v. *Louisiana*, 391 U.S. 68 (1968), involving recovery under a wrongful death statute, the Court concluded:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing difficulties on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise."

Weber v. *Aetna Casualty and Surety Co.*, 406 U.S. at 175-76.

In subsequent social welfare cases the Court has relied on this principle to reject disparate treatment of illegitimate children. In *Gomez* v. *Perez*, 409 U.S. 535 (1973), the Court held that:

> ". . . a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a

> judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother."

Id., 409 U.S. at 538. Again in *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974), the Court found unconstitutional a provision of the Social Security Act regarding Children's Benefits which discriminated against illegitimate children born after the onset of the wage earner's disability. It reiterated its position that discrimination based on status of birth was unconstitutional. *Id.*, 417 U.S. at 632. *Accord: Beaty* v. *Weinberger*, 478 F.2d 300 (5th Cir. 1973), *aff'd summarily*, 418 U.S. 901 (1974).

The Supreme Court has also summarily affirmed two lower court decisions invalidating a provision of the Social Security Act under which certain classes of illegitimate children could receive Children's Benefits only if other survivors of the deceased did not exhaust the Act's maximum family allowance. *Davis* v. *Richardson*, 342 F. Supp. 588 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972); *Griffin* v. *Richardson*, 346 F. Supp. 1226 (D. Md.), *aff'd* 409 U.S. 1069 (1972).

In *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973), the Court struck down a provision of New Jersey's program of "Assistance to Families of the Working Poor." The plaintiffs challenged an aspect of the program which limited benefits to families with two ceremonially married adults and at least one minor child of both. The

Court, quoting *Weber* and relying as well on *Levy* and *Gomez*, sustained the constitutional objection, concluding that:

> ". . . appellants' claim of the denial of equal protection must be sustained, for there can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate."

Id., 411 U.S. at 621.

In its most recent case in point, involving intestate inheritance, the Supreme Court held that "the statutory discrimination against illegitimate children is unconstitutional. . . ." *Trimble* v. *Gordon*, 430 U.S. 762, 766 (1977). The case in effect overruled *Labine* v. *Vincent*, 401 U.S. 532 (1974), which itself was one of only two cases decided since 1968 upholding unequal treatment of illegitimates. See 430 U.S. at 776, n.17. In *Trimble* the Court noted that Labine is "difficult to place in the pattern of this Court's equal protection decisions, and subsequent cases have limited its force as a precedent." 430 U.S. at 767-68, n.12.

Trimble has also rendered moot the only other case since 1968 upholding disparate treatment of illegitimates. That case, *Mathews* v. *Lucas*, 427 U.S. 495 (1976), involved Children's Insurance Benefits under the Social Security Act. In one part the Act requires a child to be dependent upon his insured parent to qualify for the benefits, 42 U.S.C. § 402(d)(1)(C), but then concludes that an extensive list of categories

of children are presumptively dependent, including all legitimate children and many classes of illegitimate offspring. As the Court notes, ". . . a child who would be entitled to inherit personal property from the insured parent's estate under the applicable state intestacy law, is considered to have been dependent at the time of the parent's death." *Id.*, 427 U.S. at 499. *See also Jimenez* v. *Weinberger*, 417 U.S. 628, 631 n.2 (1974). Since *Trimble* requires that all illegitimate children may now inherit upon intestacy (with the possible exception of residents of Louisiana), *Lucas* is effectively moot and no illegitimates will have to prove dependency in order to qualify for Children's Benefits. The discrimination against illegitimate children and their mother in the provision of Mother's Insurance Benefits is thus apparently the sole remaining vestige of a variety of discriminatory provisions against illegitimates in the Social Security Act which have fallen under the recent decisions of the United States Supreme Court.

In any event *Lucas* does not apply to the case at bar which involves an exclusion of all illegitimates without any opportunity to prove dependency and the inclusion of all legitimates without regard to dependency. In this regard, *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974) and *Beaty* v. *Weinberger*, 478 F.2d 300 (5th Cir. 1973), *summarily aff'd*, 418 U.S. 901 (1974), are more nearly controlling. Both cases involved the situation of children of a disabled insured worker born after the onset of the disability. After-born legitimate children and some classes of after-

born illegitimate children receive Children's Insurance Benefits, but other after-born illegitimate were barred from benefits, regardless of whether they were living with or were dependent on the insured. The Court found that the statute was both overinclusive by granting benefits to children not dependent on the insured and underinclusive by denying benefits to children who were actually dependent on the insured. It concluded, in *Jimenez*, at 417 U.S. at 637:

> ". . . hence to conclusively deny one subclass benefits presumptively available to the other denies the former equal protection of the laws guaranteed by the due process provision of the Fifth Amendment."

The case at bar is even a stronger example of an unconstitutional statute because it encompasses a total exclusion of all illegitimates from Mother's Insurance Benefits and a total inclusion of all legitimate children, regardless of dependency. In both *Jimenez* and *Beaty*, the discrimination was actually between classes of illegitimates on one hand and a class made up of both legitimates and illegitimates on the other. Nevertheless the Court struck down the absolute bar to benefits.

In contrast, *Mathews* v. *Lucas*, 427 U.S. 495 (1976), involved only overinclusion, not underinclusion. Unlike here, the disfavored class in *Lucas* had the opportunity to qualify for benefits by proving dependency. Indeed, defendant's scant reference to the *Lucas* case in his memorandum indicates recognition of its inapplicability.

Instead, defendant relies on two Social Security cases which do not involve discrimination against illegitimate children at all. *Califano* v. *Jobst*, —— U.S. ——, 98 S.Ct. 95 (1977); *Mathews* v. *deCastro*, 429 U.S. 181 (1976). The Court recognizes that in cases such as these the rule of *Dandridge* v. *Williams*, 397 U.S. 471 (1970), applies so that the statute may draw distinctions in granting social welfare benefits so long as they have a rational basis, even though the classification is not mathematically precise or results in some inequality. *Mathews* v. *deCastro*, 429 U.S. at 185. But the cases also acknowledge that distinctions based on sex and illegitimacy aren't treated in quite the same fashion.

Although the strict scrutiny applicable to race discrimination is not applicable to illegitimates, *Mathews* v. *Lucas*, 427 U.S. 495, 506 (1976), the Supreme Court has indicated that the courts must look more closely to analyze the statutory purpose and the rationality of the means sought to achieve it when discrimination against illegitimates results. In *Trimble* v. *Gordon*, 430 U.S. 762 (1977), the Court noted that although the strict scrutiny test is not applicable to illegitimacy cases, it recognized that illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis for statutory differentiation. The Court then concluded:

> "Despite the conclusion that classifications based on illegitimacy fall in a "realm of less than strictest scrutiny," *Lucas* also establishes that

> the scrutiny "is not a toothless one," . . . a proposition clearly demonstrated by our previous decisions in this area."

Id., 430 U.S. at 767.

The approach which the Court took to the Illinois intestacy statute is illustrative of the required constitutional review in cases involving discrimination against illegitimates. A variety of rationales were offered by the state to support its denial of intestate inheritance from the father to his illegitimate children. The Court sifted through the rationales, rejecting some as not expressing the purpose of the Illinois legislature in enacting the statute. As to others, it decided the means used by the state to achieve the purpose was unconstitutionally broad. It noted that the statute did not meet the test that was central to the finding of constitutionality in *Mathews* v. *Lucas*, 427 U.S. 495 (1976), that the "statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations." *Trimble* v. *Gordon*, 430 U.S. at 772.

The Court has followed this pattern of careful evaluation of the statutory purposes in all of its illegitimacy cases in the past ten years. In *Levy* v. *Louisiana*, 391 U.S. 68 (1968) and *Glona* v. *American Guarantee and Liability Insurance Co.*, 391 U.S. 73 (1968), arguments that denial of wrongful death benefits to illegitimates and their mother would discourage immorality and illegitimacy were examined and found constitutionally insufficient to justify the

discrimination. A similar analysis overturned discrimination against illegitimates in workers' compensation benefits against an argument that giving preference to legitimate children strengthens family ties and comports with the norm of closer family relationships between a father and his legitimate children. *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972). In *Gomez* v. *Perez*, 409 U.S. 535 (1973), the Court rejected the "lurking problems of proof of paternity" as justification for denying an illegitimate child the right to receive support from its father. The Court noted that under *Levy* and *Weber* "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Id.*, 409 U.S. at 538.

In *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973), the Court overturned a state public assistance program limited to families in which the mother and father are married against a claim that the statute was designed to preserve and strengthen traditional family life. The Court noted that "the benefits extended under the challenged program are as indispensable to the health and wellbeing of illegitimate children as to those who are legitimate." *Id.*, 411 U.S. at 621. In *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974), discrimination against a class of illegitimates in Social Security benefits was held unconstitutional despite a strong argument that the differential treatment was necessary to prevent spurious claims of paternity. In contrast to the decisions in cases not involving illegitimates or sex, Chief

Justice Burger's opinion for the Court closely examines the problem of spurious claims and finds they could be met without a blanket exclusion of a class of illegitimate children.

Thus none of these discredited rationales can be used to uphold the discriminatory treatment accorded illegitimates in this case. The Court, moreover, has already examined and discredited the government's arguments that this discrimination is justifiable because of considerations of the "family unit" or because legal support obligations are involved.

The suggestion of defendant that the case does not involve discrimination against illegitimates since benefits were denied plaintiff because his mother failed to qualify because she was never married to his father is sheer sophistry. Lack of marriage between the mother and father of a child is the very definition of illegitimacy. Defendant's argument was rejected by the Supreme Court in *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973) which held unconstitutional a New Jersey statute granting public assistance for families "which consist of a household composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child. . . ." 411 U.S. at 619. The Supreme Court took little space to brand this "neutral" language as nothing more than invidious discrimination against illegitimates. As the Court there recognized, ". . . although the challenged classification turns upon the marital status of the parents as well as upon the parent-child relationship, in practical effect it operates almost invariably to deny benefits to illegitimate children while granting benefits to those children who are legitimate." 411 U.S. at 619.

Under the defendant's argument, all Illinois has to do is to amend its statute to provide that intestate inheritance from the father is granted only to a child "whose mother was married to his father" and the result in *Trimble* would be overturned. Illegitimate children would not inherit, but defendant would describe the result as constitutional because the statute was now facially neutral.

Defendant has also attempted to play on the sympathy of the Court by suggesting that any increase in benefits to plaintiffs may entail a reduction in benefits to the deceased's legitimate children, due to the maximum of benefits payable on the account of one insured. Why this Court should favor the legitimate child over the illegitimate child is not explained. In any event, *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972); *Davis* v. *Richardson*, 342 F. Supp. 588 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972); and *Griffin* v. *Richardson*, 346 F. Supp. 1226 (D. Md.), *aff'd*, 409 U.S. 1069 (1972) expressly reject such contention on the part of defendant.

The reality of the history of the Social Security Act is that the Act discriminated against illegitimate children because of the stigma of their birth, the very kind of legislation the Supreme Court has consistently condemned since 1968. Until 1965, twenty-six years after Children's Benefits were first instituted, the Social Security Act gave no benefits to illegitimate

children. *See Davis* v. *Richardson*, 342 F. Supp. 588, 591 (D. Conn.), *summarily aff'd*, 409 U.S. 1069 (1972). Then Congress included illegitimate children but hedged their benefits with a series of discriminatory provisions, almost all of which have been struck down by the Supreme Court. The last vestige of this discrimination now appears to be before this Court, and the Court is of the opinion that it should suffer the same fate. Illegitimate children have an equal need and an equal right with legitimate children for the opportunity to have their mothers stay home to care for them when they are young.

It is accordingly

ORDERED that Defendant's motion for summary judgment is DENIED;

ORDERED that Plaintiff's motion for summary judgment is GRANTED;

DECLARED that Section 202(g)(1) of the Social Security Act, 42 U.S.C. § 402(g)(1), is unconstitutional and void insofar as it prevents Plaintiffs and the Plaintiff Class from receiving Mother's Insurance Benefits solely on the ground that Plaintiff mothers were never married to the fathers of their children;

ORDERED that the Defendant is permanently enjoined from denying benefits to Plaintiffs and the Plaintiff Class on the basis of the marriage requirement declared unconstitutional herein;

ORDERED that the Defendant make payment of Mother's Insurance Benefits to the named Plaintiffs retroactive to January 15, 1973; and

ORDERED that the Defendant notify all illlegitimate children receiving Child's Insurance Benefits and their mothers that they are no longer ineligible for Mother's Insurance Benefits solely by reason of the marriage requirement declared invalid herein and that they may apply for such benefits.

Entered this 23 day of June 1978, at Austin, Texas.

/s/ Jack Roberts
JACK ROBERTS
United States District Judge

A true copy of the original, I certify.

DAN W. BENEDICT
Clerk

By: /s/ [Illegible]
Deputy

APPENDIX

Statutory Scheme

Section 202(g) of the Social Security Act, 42 U.S.C. § 402(g) provides in part:

> "(g)(1) The widow and every surviving divorced mother (as defined in section 216(d) of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—
>
> (A) is not married,
>
> (B) is not entitled to a widow's insurance benefits,
>
> (C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,
>
> (D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,
>
> (E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit, and
>
> (F) in the case of a surviving divorced mother—
>
> (i) the child referred to in subparagraph (E) is her son, daughter, or legally adopted child, and
>
> (ii) the benefits referred to in such subparagraph are payable on the basis of such individual's wages and self-employment income,

> shall (subject to subsection (s)) be entitled to a mother's insurance benefit for each month, beginning with the first month after August 1950 in which she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs: No child of such deceased individual is entitled to a child's insurance benefit, such widow or surviving divorced mother becomes entitled to an old-age insurance benefit equal to or exceeding three-fourths of the primary insurance amount of such deceased individual, she becomes entitled to a widower's insurance benefit, she remarries, or she dies. Entitlement to such benefits shall also end, in the case of a surviving divorced mother, with the month immediately preceding the first month in which no son, daughter, or legally adopted child of such surviving divorced mother is entitled to a child's insurance benefit on the basis of the wages in self-employment income of such deceased individual.
>
> (2) Such mother's insurance benefits for each month shall be equal to three-fourths of the primary insurance amount of such deceased individual.
>
> * * * * *

Section 216(c) of the Act, 42 U.S.C. § 416(c) provides in part:

> "(c) The term "widow" * * * means the surviving wife of an individual * * *.

Section 216 (h)(1)(A) of the Act, 42 U.S.C. section 416(h)(1)(A) provides in part:

> "(h)(1)(A) An applicant is the * * * widow * * * of a fully or currently insured individual for purposes of this subchapter * * * if such insured individual is dead, the courts of the State in which he was domiciled at the time of death * * * would find that such applicant and such insured individual were validly married * * * at the time he died. If such courts would not find that such applicant and such insured individual were validly married at such time, such applicant shall, nevertheless, be deemed to be the * * * widow * * * of such insured individual if such applicant would, under the laws applied by such courts in determining the devolution of intestate personal property, have the same status with respect to the taking of such property as a * * * widow * * * of such insured individual.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed July 20, 1978]

Civil Action No. A-77-CA-104

NORMAN J. BOLES, ET AL.

vs.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. §§ 1252 and 2101, and from the Memorandum Opinion and Order entered by the United States District Court for the Western District of Texas on June 23, 1978.

JOSEPH A. CALIFANO, JR.
Secretary of the Department
of Health, Education &
Welfare, Defendant

MORTON HOLLANDER
Chief, Appellate Section
Civil Division
Department of Justice
Washington, D. C. 20530

JAMIE C. BOYD
United States Attorney

By: /s/ Hugh P. Shovlin
HUGH P. SHOVLIN
Assistant U. S. Attorney

A true copy of the original, I certify.

DAN W. BENEDICT
Clerk

By: /s/ Wanda Peterson
Deputy

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